No. 15993

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GERTRUDE L. BRAWNER,

Appellant,

vs.

PEARL ASSURANCE COMPANY, LTD., *et al.*,

Appellees.

Appeal From the United States District Court, Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

WILLIAM H. BRAWNER and
ERNEST W. PITTSEY,
639 South Spring Street,
Los Angeles 14, California,
Attorneys for Appellant.

FILED

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

PAGE

I.

Jurisdiction of the District Court 1

II.

Jurisdiction of the Circuit Court of Appeals 2

III.

Statement of the case 2

IV.

Summary of appellant's argument 5

V.

Specification of error 5

VI.

Summary of the evidence 6

VII.

Issue involved 6

Conclusion 19

TABLE OF AUTHORITIES CITED

Cases

Cases	PAGE
Alexandra Restaurant, Inc. v. New Hampshire Insurance Co. of Manchester, 272 App. Div. 346, 71 N. Y. S. 2d 515	12
Bensley v. Mountain Lake Water Co., 13 Cal. 306	16
Detroit Fire & Marine Ins. Co. v. Boren-Stewart Co., 203 S. W. 382	10
Dubin Paper Co. v. Insurance Co. of North American, 361 Pa. 68, 63 A. 2d 85, 8 A. L. R. 2d 1393	13, 17, 18, 19
Flood Control District v. Andrews, 52 Cal. App. 788	15
Foley v. Manufacturers' & Builders' Fire Ins. Co., 152 N. Y. 131, 46 N. E. 318, 43 L. R. A. 664	12, 18
Fort v. Globe & Rutgers Fire Ins. Co., 102 Misc. 584, 169 N. Y. Supp. 229; affd., 186 App. Div. 185, 173 N. Y. Supp. 595; App. Dismd., 227 N. Y. 581, 125 N. E. 918	11, 14
Foster v. Equitable Mutual Insurance Company, 2 Gray 216, 68 Mass. 216	12
Frank Vierneisel, et al. v. Rhode Island Insurance Company, 77 Cal. App. 2d 229	8
Godwin v. Iowa State Ins. Co. of Keokuk, 27 S. W. 2d 464	10
Hartford Fire Ins. Co. v. Doll, 23 F. 2d 443, 56 A. L. R. 1059	10
Heidisch v. Globe & Republic Ins. Co. of America, 368 Pa. 602, 84 A. 2d 566, 29 A. L. R. 2d 884	13
Iowa State Ins. Co. of Keokuk, v. Godwin, 51 S. Ct. 83, 282 U. S. 880, 75 L. Ed. 777	10
John Weise, Inc. v. Notie Redd, 22 Tenn. App. 90	7
Los Altos School Dist. v. Watson, 133 Cal. App. 2d 447	16
Pink v. Smith, 281 Mich. 107, 274 N. W. 727	13
Reed v. Lukens, 44 Pa. 200	17
Rosenbloom v. Maryland Ins. Co., 258 App. Div. 14, 15 N. Y. S. 2d 304	11, 12, 14
Russekov v. McCarthy Co., 206 Cal. 682	16

PAGE

Savarese v. Ohio Farmers' Ins. Co., 260 N. Y. 45, 182 N. E. 665, 91 A. L. R. 1341 12

State Mutual Fire Insurance Co. v. Updegraff, 21 Pa. 513 17

Tiemann v. Citizens' Insurance Co., 76 App. Div. 5, 78 N. Y. Supp. 620 12

Vyn v. Northwest Casualty Co., 47 Cal. 2d 89 7

Washington Mills Emery Mfg. Co. v. Weymouth & Braintree Mut. Fire Ins. Co., 135 Mass. 503 12

Statutes

Civil Code, Sec. 1249 .... 13, 15

Civil Code, Sec. 1253 .... 13, 15, 16

Insurance Code, Sec. 250 7

Insurance Code, Sec. 281 7

Insurance Code, Sec. 301 8

Insurance Code, Sec. 2051 7

United States Code Annotated, Title 28, Sec. 1291 2

United States Code Annotated, Title 28, Sec. 1441 2

Textbook

14 Ruling Case Law, Sec. 535, p. 1365 7

No. 15993

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GERTRUDE L. BRAWNER,

Appellant,

vs.

PEARL ASSURANCE COMPANY, LTD., *et al.,*

Appellees.

Appeal From the United States District Court, Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

I.

Jurisdiction of the District Court.

This is an appeal from a Summary Judgment of the United States District Court for the Southern District of California, Central Division, as follows:

(1) The Judgment on Motion for Summary Judgment in favor of the defendant, Pearl Assurance Company, Limited, a corporation.

(2) From the Judgment denying Motion for Summary Judgment of plaintiff, Gertrude L. Brawner, for the sum of $7,500.00 fire loss and the sum of $150.00 loss of rentals under Defendant's policy of insurance, and

(3) From the whole of the Final Judgment entered in this action on the 26th day of February, 1958.

The above-entitled cause is a civil action originally filed in Los Angeles Superior Court. The District Court of the United States has original jurisdiction in that the Plaintiff was, at the commencement of this action, and ever since has been and now is a citizen of the State of California, and that Defendant, Pearl Assurance Company, Limited, a corporation, is a corporation organized and existing under and by virtue of the laws of England in the Kingdom of Great Britain, with its principal place of business in the City of London and a non-resident of the State of California. [Tr. pp. 3-6.]

That the amount in controversy is in excess of $3,000.00, exclusive of interest and costs.

That a proper bond for removal has been filed [Tr. p. 17; 28 U. S. C. A., Sec. 1441.]

II.

Jurisdiction of the Circuit Court of Appeals.

This Honorable Court has jurisdiction to review the Summary Judgment rendered by the District Court in favor of Appellee, Pearl Assurance Company, Ltd., under the provisions of 28 U. S. C. A., Section 1291.

III.

Statement of the Case.

Appellee, Pearl Assurance Company, Limited, a corporation, on October 2, 1955, for value received, duly issued its policy of Fire Insurance No. D1152238 in the California Standard Form prescribed, for fire insurance policies by laws of the State of California, insuring said plaintiff, Gertrude L. Brawner, against loss by fire to the building situate at 125-127-127½ South Bunker Hill Avenue, Los Angeles, California, and against loss of rentals. [Tr. p. 12, lines 6-19.]

Said property was destroyed by fire on February 4, 1957. [Tr. p. 10.]

Appellee, Pearl Assurance Company, Limited, a corporation, policy No. D1152238 was in full force and effect at the time said building was destroyed. [Tr. pp. 18-19.]

The insured, Gertrude L. Brawner, duly reported the occurrence of said fire and the destruction of the building to said insurance company and demanded payment of the full amount of insurance on the building with legal interest thereon and of the sum of $150.00 loss of rentals. [Tr. pp. 19-20.]

The insured, Gertrude L. Brawner, was the owner in fee simple and in possession of said insured property on said February 4, 1957, and continued as such until April 12, 1957. The loss sustained by the fire became payable to the insured legal owner, Gertrude L. Brawner, at the time the fire occurred. That by reason of said fire and the destruction of said insured property, plaintiff Gertrude L. Brawner became entitled to payment for the loss sustained, to wit, the sum of $7,500.00 plus the sum of $150.00 per (64) loss of rentals. [Tr. p. 20.]

At the time said insured property was destroyed the entire property at the above-mentioned address was being condemned by the County of Los Angeles, a political subdivision of the State of California, in case No. 658447, entitled County of Los Angeles vs. Anna Anderson, Gertrude L. Brawner, *et al.,* in the Superior Court of the State of California, in and for the County of Los Angeles. That at the time of said fire the said County of Los Angeles had not taken possession of said property and no judgment of condemnation had been entered on said property and no award of any kind had been made by said condemning body to Gertrude L. Brawner.

Subsequent to the loss sustained by said plaintiff and on April 5, 1957, judgment by stipulation [Tr. pp. 26-37] was entered between the County of Los Angeles and said Gertrude L. Brawner for the then value of said property, to wit, the sum of $26,400.00. Thereafter and on the 12th day of April, 1957, payment was made by said County of Los Angeles to said Gertrude L. Brawner of the amount of said interlocutory judgment and the fee title transferred by said Gertrude L. Brawner to the County of Los Angeles pursuant to law.

Said condemnation action entitled County of Los Angeles vs. Anna Anderson, Gertrude L. Brawner, *et al.,* Los Angeles Superior Court case No. 658447 was not brought to trial within one (1) year from date of filing said action. [Tr. p. 26.] Appellee was not a party to said action and the County of Los Angeles, plaintiff in said condemnation action, is not a party herein.

A stipulation entered into by and between plaintiff and Gertrude L. Brawner in said condemnation action No. 658447 relates only to the real property and the then existing improvements. (65) It does not relate to nor purport to relate to the non-existing improvements theretofore destroyed by fire.

Defendant admits liability to the insured Gertrude L. Brawner as legal owner as of the date of the fire, to wit, February 4, 1957, with an insurable interest therein for loss of rentals under said policy. [Tr. p. 20.]

Plaintiff, Gertrude L. Brawner, sustained loss by reason of the destruction of said building in the sum of $7,500.00 and of rentals in the sum of $150.00.

Appellee admits liability for loss of rentals but denies liability for loss of buildings insured under their policy.

Motions for Summary Judgment were filed by both plaintiff [Tr. p. 24] and defendant. [Tr. p. 22.] On February 26, 1958 the District Court made its Findings of Fact, Conclusions of Law and Judgment denying plaintiff's motion for Summary Judgment and granting defendant's motion for Summary Judgment. [Tr. p. 53.] Thereupon, within time allowed by law, this appeal followed. [Tr. p. 55.]

IV.

Summary of Appellant's Argument.

The issue involved in this appeal is:

Does the fee simple owner of real property which is under pending condemnation action by eminent domain in the California Superior Court under which no evaluation or awards have been made and title to which has not yet passed to Condemnor, have an insurable interest in the property entitling him to compensation under a contract of insurance upon the loss of the building by fire?

It is appellant's position that this issue must be answered in the affirmative under the laws of the State of California and that the judgment herein to the contrary is erroneous.

V.

Specification of Error.

Appellant hereby makes the following specifications of error: that the Findings of Fact of the trial court on Motion for Summary Judgment do not support the Conclusions of Law or the Judgment, but that upon said Findings of Fact appellant is entitled to Judgment as a matter of law; that the evidence is insufficient to sustain the Findings of Fact, Conclusions of Law and Judgment.

VI.

Summary of the Evidence.

There is apparently no substantial conflict in the evidence in this matter which is a Motion for Summary Judgment by each of the parties on affidavits of the parties [Tr. p. 3], the facts being as set out herein under appellant's Statement of Case.

The motions for Summary Judgment were heard before the Honorable Harry C. Westover, Judge presiding, sitting without a jury and on February 17, 1958, the Court denied appellant Gertrude L. Brawner's Motion [Tr. 39] and thereafter made its Findings of Fact, Conclusions of law and Judgment in favor of Appellee, Pearl Assurance Company, Ltd. [Tr. pp. 49-54.] In due course, this appeal from said Judgment followed.

VII.

Issue Involved.

The issue involved in this appeal is: Does the fee simple owner of real property which is under pending condemnation action by eminent domain, in the Superior Court of the State of California, under which no evaluation or awards have been made and title to which has not yet passed to Condemnor, have an insurable interest in the property entitling her to compensation under a contract of insurance upon the loss of the building by fire?

(a) The loss of plaintiff owner insured, Gertrude L. Brawner, became a fixed liability fastened on insurer, Pearl Assurance Company, Limited, a corporation, under their said policy at the time of the destruction of the insured property by fire on February 4, 1957, and must be computed as of said date and insurer cannot escape

its liability by reason of uncertain subsequent events which may or may not lead to a change of ownership.

(b) A change of interest in said insured property after the occurrence of an injury which results in a loss, does not affect the right of the insured to recover for the loss and will not enable the insurer to avoid its liability assumed under its policy.

A contract of insurance is purely a personal contract between the insured and the insurance company.

> 14 R. C. L. 1365, Sec. 535;
>
> *John Weise, Inc. v. Notie Redd,* 22 Tenn. App. 90;
>
> *Vyn v. Northwest Casualty Co.,* 47 Cal. 2d 89.

California Insurance Code, Section 250, provides:

> "Except as provided in this article any contingent or unknown event, whether past or future, which may damnify a person having an insurable interest, or create a liability against him, may be insured against, subject to the provisions of this code."

California Insurance Code, Section 2051, provides:

> "Measure of Indemnity under open policy:
>
> "Under an open policy, the measure of indemnity in fire insurance is the expense to the insured of replacing the thing lost or injured in its condition at the time of the injury, such expense being computed as of the time of the commencement of the fire." (60)

California Insurance Code, Section 281, provides:

> "Every interest in property, or any relation thereto or liability in respect thereof, of such a nature that a contemplated peril might directly damnify the insured, is an insurable interest."

California Insurance Code, Section 301, provides:

> "A change of interest in a subject insured, after the occurrence of an injury which results in a loss, does not affect the right of the insured to indemnify for the loss."

In the matter of *Frank Vierneisel, et al. v. Rhode Island Insurance Company,* 77 Cal. App. 2d 229 at 231, the Court had before it the matter of loss by fire and right of legal owners to recover for loss by fire on property which was in escrow with sale pending and possible transfer of title contemplated, the Court said:

> "(1) First: Were the Ferreros the legal owners of the premises on the date of the fire?
>
> This question must be answered in the affirmative. The property was destroyed on June 29, 1944. The escrow had been opened for the sale of the property to plaintiffs on the day before, June 28, 1944. However, the deed was not delivered to plaintiffs until October 27, 1944.
>
> "It is the general rule that where conditions fixed for delivery of a deed are not such as are certain to happen, merely depositing the deed with an escrow holder does not pass title to the grantee. (*Holman v. Toten,* 54 Cal. App. 2d 309, 313 (128 P. 2d 808), and cases cited therein.)
>
> "In the present case the conditions of the escrow were not certain to happen and title did not pass until plaintiffs had complied with the conditions of the escrow and were entitled to receive the deed. Therefore on the date of the fire the Ferreros were the legal owners of the property which was destroyed. . . . For a case based on facts similar to those in the present case and holding that the right to recover on a fire insurance policy is not forfeited be-

cause a deed is placed in escrow awaiting performance of conditions precedent to the delivery thereof to the vendee see *Pomeroy v. Aetna Insurance Co.,* 86 Kan. 214 (120 P. 344, Ann. Cas. 1913C, 170, 38 L. R. A. N. S. 142).

"It is settled that after a loss has arisen liability is fastened upon the insurer and any right of the insured as a result of the loss may be assigned with or without the consent of the insurer. (*Ocean Acc. etc. Corp. v. Southern Bell Telephone Co.* (Western Dist. of Mo.), 100 F. 2d 441, 444; *Davies v. Maryland Casualty Co.,* 89 Wash. 571 (154 P. 1116, 155 P. 1035, L. R. A. 1916D, 395).) In the present case the loss occurred on June 29, 1944, and the assignment was not made by the Ferreros to plaintiffs until October 6, 1944.

"(3) Third: Were the Ferreros the sole and unconditional owners of the destroyed property on June 29, 1944, the date of the fire?

"This question must be answered in the affirmative. An option to purchase does not vest such an interest in the optionee as to void an insurance policy which provides that it shall be void in case of a change in interest, title or possession with the consent of the insured. (*Mackintosh v. Agricultural Fire Ins. Co.,* 150 Cal. 440, 442 et seq. (89 P. 102, 119 Am. St. Rep. 234).)

"*Brickell v. Atlas Assurance Co., Ltd.,* 10 Cal. App. 17 (101 P. 16), is factually distinguishable from the present case. In the cited case the insured had entered into an agreement for the sale of his property, the purchase price was to be paid in installments and the purchaser had the right of possession. In such case the vendor did not have an absolute title, the equitable title being vested in the purchaser. At the time of the fire in the present

case the plaintiff held merely the right to complete the terms of the escrow and thus become entitled to acquire the property. Therefore the instant case falls under the rule announced by our Supreme Court in *Mackintosh v. Agricultural Fire Ins. Co., supra.*"

Speculative collateral questions should not be allowed to enter into the ascertainment of actual value so insurer's liability is not affected by the fact that the insured had offered to sell the property for less than its actual value. The fact that the amount of loss cannot be determined without difficulty, or is to some extent a matter of estimate, does not affect insurer's liability or insured's right to compensation.

> *Godwin v. Iowa State Ins. Co. of Keokuk* (Iowa App.), 27 S. W. 2d 464, cert. den. *Iowa State Ins. Co. of Keokuk, Iowa, v. Godwin,* 51 S. Ct. 83, 282 U. S. 880, 75 L. Ed. 777;
>
> *Detroit Fire & Marine Ins. Co. v. Boren-Stewart Co.* (Civ. App.), 203 S. W. 382;
>
> *Hartford Fire Ins. Co. v. Doll* (C. C. A. Ind.), 23 F. 2d 443, 56 A. L. R. 1059.

Measure of Indemnity under open policy. Under an open policy, the measure of indemnity in fire insurance is the expense to the insured of replacing the thing lost or injured in its condition at the time of the injury, such expense being computed as of the time of the commencement of the fire.

In an action to recover on an insurance policy covering a building which was destroyed by fire where the insurance company claimed that the policy was forfeited because of a change in the title, interest or possession of the property insured, through and resulting from an or-

der made by the commissioner on condemnation, such order having been made before the fire occurred, although the compensation had not been paid until several months after the fire, the court in *Fort v. Globe & Rutgers Fire Ins. Co.,* 102 Misc. 584, 169 N. Y. Supp. 229, affd. 186 App. Div. 185, 173 N. Y. Supp. 595, app. dismd. without op. 227 N. Y. 581, 125 N. E. 918, held that the title to the property at the time of the fire was the same as it was when the policy of insurance was issued, on the basis of a statute providing that title to property taken by the city would not pass until payment or deposit of the sum to be paid as compensation, the city in the instant case not being seized of the property or entitled to enter thereon until after the date of the fire.

Likewise, the plaintiff was allowed to recover under a policy insuring property from damage by fire, in *Rosenbloom v. Maryland Ins. Co.,* 258 App. Div. 14, 15 N. Y. S. 2d 304, where a municipal housing authority had contracted with the plaintiff for the purchase of the property, and had exercised its option to take the property by condemnation proceedings after the fire occurred, the court holding that the plaintiff was, at the time of the fire, the absolute and legal owner of the insured property, and that "his insurable interest was the full value of the insured building," since he would have had to bear the loss himself, but for the insurance. There was said to be nothing in the contract or in the relation of the parties between themselves or to the property which would provide a defense to the present action.

The fact that the building was subject to removal or was soon to have been removed does not affect the right

of insured to recover its value as a building from insurer, where it is destroyed before the time for removal.

Washington Mills Emery Mfg. Co. v. Weymouth & Braintree Mut. Fire Ins. Co., 135 Mass. 503.

In the case of *Alexandra Restaurant, Inc. v. New Hampshire Insurance Co. of Manchester,* 272 App. Div. 346, 71 N. Y. S. 2d 515, a lessor had restored, under a lease, after a fire, improvements which the lessee had insured against loss by fire. The Supreme Court of New York, Appellate Division, held that, under the law of that State the fact that the lessor had restored the improvements did not affect the insurer's liability under its policy. In support of its decision, the court cited: *Foley v. Manufacturers' & Builders' Fire Ins. Co.,* 152 N. Y. 131, 46 N. E. 318, 43 L. R. A. 664; *Savarese v. Ohio Farmers' Ins. Co.,* 260 N. Y. 45, 182 N. E. 665, 91 A. L R. 1341; *Tiemann v. Citizens' Insurance Co.,* 76 App. Div. 5, 78 N. Y. Supp. 620; *Rosenbloom v. Maryland Insurance Co.,* 258 App. Div. 14, 15 N. Y. S. 2d 304. The rulings in those cases are discussed in the opinion. The *Alexandra Restaurant* case was affirmed by the Court of Appeals of New York, 297 N. Y. 853, 79 N. E. 2d 268. It is apparent that, under the law of New York, the rights of an insurer and the insured under a fire insurance policy are established as of the time of the fire and loss, and that the fact that the insured has ultimately recouped his loss from another source does not relieve the insurer of its liability.

In *Foster v. Equitable Mutual Insurance Company,* 2 Gray 216, 68 Mass. 216, it was held that a mortgagee's right to recover on a fire insurance policy upon his interest in the mortgaged property was not affected by the repair of the loss by the owner of the equity of redemp-

tion. The Supreme Court of Massachusetts said, at pages 220-221 of 68 Mass.:

> ". . . The plaintiffs had an insurable interest in the property; the defendants agreed to insure it against a loss by fire; and a loss has occurred. The contingency contemplated by the contract has therefore arisen, and the defendants are bound to pay the amount of the damage. It is wholly immaterial to them, and constitutes no valid defense to this suit, that the property has been since repaired."

See also:

Pink v. Smith, 281 Mich. 107, 274 N. W. 727;

Dubin Paper Co. v. Insurance Co. of North America, 361 Pa. 68, 63 A. 2d 85, 8 A. L. R. 2d 1393;

Heidisch v. Globe & Republic Ins. Co. of America, 368 Pa. 602, 84 A. 2d 566, 29 A. L. R. 2d 884.

Under California ~~Civil Code~~ Code of Civil Procedure, Sections 1249 and 1253, the only property taken under the condemnation proceedings is that *actually taken* at the time the condemnor takes possession. Title is acquired under the above-cited code section only when payment has been made by the condemnor and order entered, in this case, April 29, 1957.

Title to the property remained in plaintiff until the County paid the amount of the stipulated judgment on April 12, 1957. Defendants apparently argue that this is a mere paper title to secure payment of the award and is not such a title as to constitute an insurable interest. It is further argued that plaintiff has suffered no economic loss and cannot recover for that reason. These arguments are not sound and must be rejected.

In an action to recover on an insurance policy covering a building which was destroyed by fire where the

insurance company claimed that the policy was forfeited because of a change in the title, interest or possession of the property insured, through and resulting from an order made by the commissioners on condemnation, such order having been made before the fire occurred, although the compensation had not been paid until several months after the fire, the court in *Fort v. Globe & Rutgers Fire Ins. Co.,* 102 Misc. 584, 169 N. Y. Supp. 229, affd. 186 App. Div. 185, 173 N. Y. Supp. 595, app. dismd. without op. 227 N. Y. 581, 125 N. E. 918, held that the title to the property at the time of the fire was the same as it was when the policy of insurance was issued, on the basis of a statute providing that title to property taken by the city would not pass until payment or deposit of the sum to be paid as compensation, the city in the instant case not being seized of the property or entitled to enter thereon until after the date of the fire.

Likewise, the plaintiff was allowed to recover under a policy insuring property from damage by fire, in *Rosenbloom v. Maryland Ins. Co.,* 258 App. Div. 14, 15 N. Y. S. 2d 304, where a municipal housing authority had contracted with the plaintiff for the purchase of the property, and had exercised its option to take the property by condemnation proceedings after the fire occurred, the court holding that the plaintiff was, at the time of the fire, the absolute and legal owner of the insured property, and that "his insurable interest was the full value of the insured building," since he would have had to bear the loss himself, but for the insurance. There was said to be nothing in the contract or in the relation of the parties between themselves or to the property which would provide a defense to the present action.

Under California Code of Civil Procedure, Sections 1249 and 1253, the only property taken under the condemnation proceedings is that *actually taken* at the time the condemnor takes possession. Possession is acquired under the above-cited code sections only when payment has been made by the condemnor and order entered, in this case, April 12, 1957.

An analogous situation to the one presented here involves the taking under condemnation proceedings of leasehold interests and improvements made thereunder in *Flood Control District v. Andrews,* 52 Cal. App. 788 at 794, wherein the court held:

> "Appellant contends that its right to the damages in question is established by the fact that its leasehold was interrupted, in contemplation of law, on March 20, 1919, the date when summons was issued; but the rule that damages are to be assessed in condemnation cases as of the date of the issuance of summons relates only to *property actually taken.* An anomalous and unbearable condition would be presented if, under that rule, the public could be required to pay for a leasehold interest not taken, but which the lessee held unmolested to the end of the term, or for the cost of the removal of structures which the lessee must have removed before the expiration of the term, or must have lost altogether. Fortunately, such a condition does not exist under the law (Schreiber v. Chicago & E. R. Co., 115 Ill. 340 (3 N. E. 427))."

California Code of Civil Procedure, Section 1253, determines the time when title vests in the condemnor as follows:

> "§1253. Final order of condemnation, what to contain: When filed, title vests. *When payments*

have been made and the bond given, if the plaintiff elects to give one, as required by the last two sections, the court must make a final order of condemnation, which must describe the property condemned and the purposes of such condemnation. A copy of the order must be filed in the office of the recorder of the county, and thereupon the property described therein shall vest in the plaintiff for the purposes therein specified."

Bensley v. Mountain Lake Water Co., 13 Cal. 306;

Russekov v. McCarthy Co., 206 Cal. 682, 687;

Los Altos School Dist. v. Watson, 133 Cal. App. 2d 447 at 450.

Condemnor cannot acquire title until after rendition of judgment determining right to condemn and fixing amount of compensation to be paid and thereafter not until payments have been made and final order of condemnation has been filed in the office of the County Recorder.

Los Altos Sch. Dist. v. Watson, 133 Cal. App. 2d 447.

Title to the property remained in plaintiff until the County paid the amount of the stipulated judgment on April 12, 1957, and until final order was made and entered on April 29, 1957, pursuant to Code of Civil Procedure, Section 1253. Defendants apparently argue that this is a mere paper title to secure payment of the award and is not such a title as to constitute an insurable interest. It is further argued that plaintiff has suffered no economic loss and cannot recover for that reason. These arguments are not sound and must be rejected.

This case is analogous to the situation where the insured enters into an agreement to sell the premises and

after the signing of the agreement but prior to the passage of title a fire occurs. There, as here, the insured holds title as security for the purchase price. In that situation it has been repeatedly held that the vendor possesses an insurable interest.

The following cases, to wit: *Dubin Paper Co. v. Ins. Co. of N. America,* 361 Pa. 68, 63 A. 2d 85, 8 A. L. R. 2d 1393; *State Mutual Fire Insurance Co. v. Updegraff,* 21 Pa. 513, and *Reed v. Lukens,* 44 Pa. 200, hold that the person possessed of the legal title has an insurable interest and the insurance company is liable to him under the terms of the policy. In each of those cases it was further held that the holder of the legal title was a trustee of the funds thus received for the purchaser or equitable owner. The application of this latter rule to these facts cannot be decided here, however, because the purchaser (condemnor) has not been made a party to these proceedings. The pertinent point is that defendant may not set up the equitable ownership in another as a defense to a suit on its contract with plaintiff. The rule is stated in *Reed v. Lukens, supra,* 44 Pa. at page 202: "The insurance company, however, became liable to pay for the loss to the (insured), because . . . he, as respects third persons, not privy to the contract of sale, is still to be regarded as the owner of the property." Legal title being in plaintiffs, they had an insurable interest and are entitled to recover from defendant for the loss incurred as a result of the fire.

Defendant argues that plaintiff suffered no loss by the fire; that the amount of the award by the county was in no way affected by the fire and further that the county gained by the fire since it saved money by not having to

raze the building. *Dubin Paper Co. v. Ins. Co. of N. America, supra,* supplies the complete answer to this argument. There, the insurance company likewise argues that (361 Pa. at 82, 63 A. 2d at 92):

> "Unless the insured has sustained an actual monetary loss, the insurer has no liability."

We answered that by saying:

> "The error in this argument is in the defendants' interpretation of the word 'loss' . . . the insurance company gives the insured the equivalent in money of the building loss by fire. The 'loss' which the insurance company contracted to pay to the owner of the building in the event of its destruction by fire is the actual worth in money of that building before it was destroyed."

The rule is stated in 361 Pa. at 91, 63 A. 2d at 96:

> "The loss the company contracts to remedy is the fire-created depletion of the insured's assets, and that is made up not by the erection of a duplicate of the building destroyed but by paying the insured its value in money. This liability the insuring companies cannot escape by anything any third party may later do for the insured's benefit."

See also

> *Foley et al. v. Manufacturers' & Builders' Fire Ins. Co. of New York,* 152 N. Y. 131, 46 N. E. 318, 43 L. R. A. 664.

Thus, the fact that plaintiffs were paid the full amount of the award by the County and suffered no monetary loss as a result of the fire is no defense to this suit. We can conceive of many instances where the insured might suffer no out-of-pocket loss, some of which are set forth

very clearly in the *Dubin* case, but that fact does not defeat his right to recover. Nor does the fact that the County gained by the fire affect the result. Conceivably that might have some bearing in an action between plaintiff and the County but certainly in a suit between insured and insurer that information is wholly irrelevant.

The existence of the contract of insurance and the occurrence of the fire are admitted. Legal title in plaintiff cannot be denied. Defendants are, therefore, liable under the terms of their contract.

Conclusion.

Appellant Gertrude L. Brawner respectfully submits that the Summary Judgment in favor of Appellee, Pearl Assurance Company, Limited, a corporation, is erroneous and should be reversed and that the trial court be instructed to enter Judgment in favor of Gertrude L. Brawner.

Respectfully submitted,

William H. Brawner and
Ernest W. Pitney,
By William H. Brawner,
Attorneys for Appellant.